

Blue Book

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 58133-s410 BY LLOYD DEBRUYCKER)

FINAL ORDER

* * * * *

On October 8, 1987, the Proposal for Decision in this matter was entered. The Proposal recommended that Application for Beneficial Water Use Permit No. 58133-s410 be denied without prejudice. Applicant Lloyd DeBruycker filed exceptions to the Proposal and requested that oral arguments be held pursuant to Section 2-4-621(1), MCA. An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on March 2, 1988, in Choteau, Montana. Present at the hearing were Lloyd DeBruycker, Applicant, and C. Bruce Loble, attorney for the Applicant. Rhett Hurless, expert witness for the Applicant, also appeared.

Objectors present were Jay Wipf, on behalf of the New Rockport Colony, and Charles Joslyn, attorney for Harold and Fay Baker. Other objectors present were Charles Danreuther on his own behalf and William Reichelt, President of the Teton Water Users Association.

The Proposal for Decision recommended that Application for Beneficial Water Use Permit No. 58133-s410 be denied. The Hearing Examiner found that the Applicant did not present a plan of operation or evidence that would ensure that water rights of prior appropriators will not be adversely affected. C. Bruce

CASE # 58133

Loble, attorney for Lloyd DeBruycker, argues in his exception to the Proposed Order that measuring devices could be installed. He argues that simply conditioning a provisional permit to require measurement devices, record keeping, and provide a minimum flow measured at some point downstream from the dam would meet the concern of the examiner.

It is the Applicant's duty to recognize and develop an operation scheme that is adequate. The Department can issue a Beneficial Water Use Permit if it finds by substantial credible evidence that the criteria of Section 85-2-311, MCA, are met. Conditions and terms can be imposed to satisfy the criteria in Section 85-2-311. However, in this case, substantial credible evidence did not exist as to an adequate operational plan. I found no error in the Findings of Fact in this matter and the Hearing Examiner correctly concluded that without an adequate operation plan the existing water rights of others would be adversely affected.

The operation plan adequacy depends on the facts and circumstances of the situation. In this case, the record shows that water to be impounded in the reservoir is snow and rain runoff in the off-irrigation season, runoff during the irrigation season, including waters of and in excess of existing water rights, flows from existing water rights of the Applicant, and the Applicant's shares and excess water from Farmers Cooperative Canal Co. With existing water rights for stock and irrigation both upstream and downstream, a complex operation plan is necessary so as not to

adversely affect other water rights. Regardless whether water is impounded only during the off-irrigation season, the method of operation and placement of measurement devices is not so simple or obvious in this case that the permit can be conditioned without further evidence.

Also, if an operation plan is imposed as a permit condition, the parties in this matter would not have had a fair chance to review and rebut it. I doubt that a department prepared operation plan would be adequate since not all the facts or implications of the operation plan could be anticipated by the Department.

On May 25, 1988, a proposed monitoring and operation plan prepared by the Applicant subsequent to the date of the oral argument was sent to the Objectors. The Objectors were asked to review and comment back to the Applicant on the proposed plan. Ultimately, a stipulation was to be prepared on an agreed to plan. On August 3, 1988, the Applicant's attorney, Mr. Loble, moved that the Department issue the Beneficial Water Use Permit subject to the requirements of the proposed reservoir plan with some revisions as proposed by some Objectors. Mr. Loble argues that even though Charles and Janet Danreuther have not responded, impoundments during the nonirrigation season of September through March or April would not adversely affect them. The Teton Water Users Association did not agree to the proposed stipulation as well.

Since the parties could not all stipulate to the proposed operation plan, the Department cannot make a summary ruling that the plan is adequate. The Motion is denied. Further, given the lack of evidence, the proposed plan is inadequate. The plan did not, for instance, identify the amount or timing of releases necessary to satisfy downstream existing water rights.

The Applicant's attorney argues that senior water rights are not adversely affected by the granting of the new use since the Objectors' senior right can be asserted over the junior right. This is true for those senior water rights upstream of the proposed reservoir who can simply divert the water and use it according to their priority. However, downstream senior users would have to have their water rights pass through the reservoir. The Hearing Examiner found no such consideration of the downstream senior water rights. Although there was a reference that the reservoir had an outlet tube, there was no evidence as to the capacity of the outlet or the amount of water to be released to satisfy downstream irrigation and stock rights.

The Applicant suggests that the Department consider the evidence and issue the permit for appropriation of water during the off-irrigation period. There is sufficient evidence in the record to show, and the Objectors generally agree, that there is sufficient water at times during the off-irrigation season.

The problem yet remains as to the operation of the reservoir during the irrigation season. Evidence as to the operation of the reservoir is still not sufficient to show that such operation

will not adversely affect existing water rights. Even though the reservoir is filled during the off-irrigation season, there is insufficient evidence to show that downstream water rights will not be adversely affected.

Accordingly, all the Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in the Order by reference. Based upon the Findings and Conclusions, all files and records herein and Exceptions and Oral Argument Hearing, the Department of Natural Resources and Conservation makes the following:


ORDER

Application for Beneficial Water Use Permit No. 58133-s410 by Lloyd DeBruycker is denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with 2-4-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 4 day of November, 1988.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 22nd day of November, 1988, as follows:

Lloyd DeBruycker
P.O. Box 7700
Dutton, Montana 59433

Harold and Fay V. Baker
Route 2
Choteau, Montana 59422

Charles M. Joslyn
P.O. Box 843
Choteau, Montana 59422

Teton Water Users Assn.
P.O. Box 222
Carter, Montana 59420

Bob Larson
Havre Field Office
P.O. Box 1828
Havre, Montana 59501

C. Bruce Loble
Attorney at Law
P.O. Box 1145
Helena, Montana 59624-1145

Charles and Janet Danreuther
P.O. Box 43
Loma, Montana 59460

Rhett Hurless
P.O. Box 3474
Bozeman, Montana 59722

Raymond Anderson
P.O. Box 844
Choteau, Montana 59422


Irene LaBare
Legal Secretary

BB.

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 58133-S410 BY LLOYD DEBRUYCKER)

* * * * *

Pursuant to the Montana Water Use Act (MCA Title 85, Chapter 2) and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 10, 1986 in Choteau, Montana.

Lloyd DeBruycker, the Applicant in this matter, appeared personally and by and through counsel K. Paul Stahl.

Rhett Hurless, consulting engineer, appeared as a witness for the Applicant.

Objector Janet Danreuther appeared at the hearing in person, and as representative for Objector Charles Danreuther.

Objector Raymond Anderson appeared at the hearing in person.

Objectors Harold and Fay Baker, appeared at the hearing in person and by and through counsel Charles Joslyn.

Lyle Baker appeared as a witness for the Objectors Baker.

Objector Teton Water Users Association was represented by Association president William Reichelt.

Marvin Cross, engineering analyst with the Havre Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

CASE # 58133

Bob Larson, Field Manager of the Havre Field Office, also appeared at the hearing in this matter.

Statement of the Case

On April 1, 1985, the Applicant filed an Application for Beneficial Water Use Permit, requesting 1750 gallons per minute ("gpm") up to 36.00 acre-feet of water per year for supplemental sprinkler irrigation on 412.2 acres of land: 2 acres in the $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}$ of Section 14; 2 acres in the $S\frac{1}{2}S\frac{1}{2}NE\frac{1}{4}$ of Section 15; 138.2 acres in the $SE\frac{1}{4}$ of Section 15; 135 acres in the $NE\frac{1}{4}$ of Section 22; and 135 acres in the $SE\frac{1}{4}$ of Section 22, all in Township 25 North, Range 4 West, Teton County, Montana. The proposed means of diversion is an on-stream dam with a storage capacity of 18.00 acre-feet, to be located in the $SE\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$ of Section 15, Township 25 North, Range 4 West, Teton County, Montana. The proposed period of appropriation is January 1 to December 31, inclusive, of each year.

The Application carries the notation that the requested flow rate is based on the maximum amount of water which could be diverted out of the dam at any given time, based on two pumps, each of 875 gpm capacity. (See Application, Section 13.) However, this remark did not appear in the public notice of the Application. All other pertinent portions of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on February 27 and March 6, 1986.

Four timely objections were filed to the Application.

Harold and Fay Baker, the Teton Water Users Association, and Charles and Janet Danreuther all objected on the basis that there are no unappropriated waters in the source of supply. Teton Water Users Association additionally alleged that its members have been adversely affected in the past by water shortage, while the Danreuthers alleged that they were without irrigation water during parts of 1984 and 1985 and that any further use would increase the adverse effect.

Raymond Anderson objected to the Application, stating:

The Department of Natural Resources has indicated the pumping of my permitted wells possibly affects the flow of water in Spring Coulee. During the past two irrigation seasons, I have drastically reduced my pumping at the request of Harold Baker and Lloyd DeBruycker. If there are unappropriated waters, my permits should be honored prior to making additional appropriations.

Marvin Cross completed a Field Report, dated April 25, 1986, which was sent to all parties of record.

This matter went to hearing on July 10, 1986, and the hearing was completed the same day. The record in this matter was closed at the end of the contested case hearing.

Exhibits

The Applicant offered three exhibits in support of his Application in this matter:

Applicant's Exhibit 1 is a copy of the field report prepared by Marvin Cross of the Havre Water Rights Bureau Field Office, dated April 25, 1986. The report consists of a four-page memorandum, three tables, an addendum entitled "The Concept of Net Depletion" (with schematic attached), and a photocopied map of the area of the Applicant's proposed places of use and points of diversion, with seven mylar map overlays.

Applicant's Exhibit 2 is a map with two overlays, prepared from the USGS Choteau Quadrangle map by Rhett Hurless. The base map shows 20-foot contour lines in and near Section 22, Township 25 North, Range 4 West; area roads; Farmers' Co-op Canal in Section 22; Spring Coulee. Overlay 1 shows the 120 acres in the SW $\frac{1}{4}$ of Section 22 which are claimed under Farmers' Co-op Canal water. The second overlay shows the location of two sprinkler pivots, of the buried pipeline, and of the storage dam.

Applicant's Exhibit 3 is a USGS quadrangle map, showing the Choteau Quadrangle, with the Applicant's property outlined in black.

Applicant's Exhibits 1, 2, and 3 were accepted for the record without objection.

The Objectors offered five exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 is a drawing, showing the general location of the John D. Baker's property in the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 31 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, Township 25 North, Range 3 West, Teton County, Montana.

Objectors' Exhibit 2 is a two-page photocopy of a summary of the Conclusions of Law reached in the Spring Coulee Decree which was entered August 31, 1905. (Case No. 388; Judgment Record Volume 1, Page 359.) The second page lists the amounts, priority dates, intended places of use, and current (1905) owners of the decreed water rights.

Objectors' Exhibits 3 (also marked as Objectors' Exhibit 1 for purposes of the hearing in the Matter of the Application for Change of Appropriation Water Rights Nos. G136329-s410, G136330-s410, and G136331-s410) is a photocopy of a map, with the property owned by Objectors Harold and Fay Baker outlined in black.

Objectors' Exhibit 4 is a two-page certified photocopy of a September 25, 1905 decree issued in the matter of Scharn v. Otness et al.

Objectors' Exhibit 5 is a certified seven-page copy of the Finding of Fact and Conclusions of Law entered in the matter of Scharn v. Otness, August 31, 1905.

Objectors' Exhibits 1, 3, and 4 were accepted for the record without objection. Applicant objected to the synopsis of water rights (specifically to Objectors' Exhibit 5, but also by implication to page 2 of Objectors' Exhibit 2) on the basis that the decree possibly was inaccurate for purposes of reflecting present ownership. Objectors' Exhibits 5 and 2 were admitted into the record with the proviso that the Hearing Examiner would check current ownership of the rights set forth in the documents.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file in this matter was made part of the record without objection, after review by all parties at the hearing.

Preliminary Matters

As noted in Statement of the Case, the Application in this matter was advertised for public notice as requesting a flow rate of 1750 gallons per minute. However, during the hearing it was made clear that this flow rate represents the maximum rate at which water stored in the proposed dam would be diverted, and does not represent the flow rate at which water would be diverted into the dam. The Applicant's testimony at the hearing indicates that it is his intent to divert at whatever flow rate is available above normal (base) flow, until his requested volume of 36 acre-feet per year has been achieved.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusion of Law, and Order:

Findings of Fact

1. Section 85-2-302 MCA (1985) states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of

diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the department."

The exceptions to permit requirements listed in §85-2-306 do not apply in the present matter. Therefore, the Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 58133-s410 was duly filed with the Department of Natural Resources and Conservation on April 1, 1985 at 1:01 p.m.

3. The pertinent portions of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on February 27 and March 6, 1986.

4. The source for the proposed new use appropriation is surface water from the main branch of Spring Coulee, in Teton County, Montana. Spring Coulee is a perennial stream. (See Applicant's Exhibit 3.) The Applicant intends to use the proposed dam and reservoir to impound part of his claimed existing water rights for withdrawal at the point of diversion. Water which the Applicant receives from the Farmer's Co-op Canal may also be impounded in the proposed diversion structure. (Testimony of Applicant.)

5. The Applicant has installed a diversion structure across Spring Coulee in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, Township 25 North, Range 4 West, in Teton County, Montana. The structure has created a reservoir with an 18 acre-foot capacity, which acts as a sump for water which the Applicant appropriates under claimed

existing use rights (See In the Matter of the Application for Change of Appropriation Water Rights Nos. G136329-410, G136330-410 and G136331-410) and contract with the Farmer's Co-op Canal Company, and allows these waters to be pumped to the places of use. (Testimony of Applicant; Applicant's Exhibit 1, page 4.)

The Applicant is requesting a new water use permit for the purpose of capturing and storing 36 acre-feet per year of water in addition to his existing water rights. The Applicant testified that this water would be captured during periods of high water (spring runoff, storm runoff, etc.), or during non-irrigation seasons. The requested period of appropriation is January 1 through December 31 of each year.

The water would be used to supplement existing irrigation on two center pivot sprinklers. The Applicant testified that the water was needed in June and July, and in the fall to charge the soil with moisture.

6. The Applicant testified that a small diversion structure previously existed at the point of diversion; that this dam was much lower than the present structure, and apparently was used for diverting flood water into ditches but was not used for storage.

The present diversion structure spans the entire creek and captures all water flowing down Spring Coulee until the 18 acre-foot capacity is achieved. Once the water level commensurate with 18 acre-feet of storage has been reached, water runs into a vertical tube in the dam, and then through a horizontal tube to be discharged back into the creek. The dam

also has a headgate which is intended to be opened in high water so the dam won't wash out, but which could also be used to release water for use downstream. (Testimony of Applicant.) In response to questioning, the Applicant agreed that the reservoir is continuously being filled to capacity.

The water which is collected in the reservoir is pumped to two center pivot sprinkler systems. (See Applicant's Exhibit 1, overlay 7. Applicant testified that the third pivot shown is now supplied from a source other than Spring Coulee.) The Applicant testified that he needs about one-quarter of the present dam capacity for a sump, to allow the operation of the pumps.

7. The Applicant testified that it is difficult to distinguish when the flow entering the reservoir is average Spring Coulee flow, when it is "high water" (flood water in excess of existing water rights), and when it is Farmer's Co-op Canal water. The Applicant testified that it is not possible to tell high flows from base flows, but that he can tell Farmer's Co-op water because of the timing, since he only calls for contract water when he is not getting enough water out of Spring Coulee and storage. However, the Applicant further testified that he did not know how much water his shares of Farmer's Co-op water represent. The Applicant stated that he has a weir on Spring Coulee at Objector Harold Baker's property (Section 21, Township 25 North, Range 4 West) and keeps measurement records from it, and that meters on all the pumps record "gallorage" used.

Applicant's witness Rhett Hurless testified that the Farmer's Co-op water could be measured because there is a Parshall flume located above the point where this contract water enters Spring Coulee, and therefore a flume could be installed and the total flow could be compared to the total flow above the point where it enters. He testified that the Applicant's diversion could be determined by establishing the base flow of Spring Coulee, determining the flow coming in from Farmer's Co-op Canal, and determining when excess water was available to be stored. Then some method of determining how much water the Applicant was diverting would have to be established, so that it would be possible to determine when the Applicant had diverted the full requested volume of water.

8. The Objectors testified that granting a new water use permit would adversely affect their senior water rights.¹

¹ Objectors Harold and Faye Baker and Charles and Janet Danreuther also objected to the Applicant's Applications for Change of Appropriation Water Rights (Nos. G136329-410, G136330-410, G136331-410), alleging adverse effects. It is possible that any effects which the Objectors may be experiencing are the result of only the changes, only the proposed new use, or both. However, in light of the fact that the Objectors have no way of ascertaining which of the Applicant's activities is causing the alleged effects, and because the changes and the proposed new use are inextricably linked (the new use is the result of the Applicant's changes, and both changes and new use already have been made), the alleged adverse effects will be considered to result from the proposed new use for purposes of the present matter, and to result from the changes for purposes of the Applications for Change.

The Objectors agreed that 36 acre-feet of unappropriated water is available during periods of high flow, such as February. (Testimony of Raymond Anderson, John Baker, Lyle Baker, Bill Reichelt, Janet Danreuther.) However, the Objectors testified that there is no regularity as to the times when excess water is available (other than February) and that there are more water rights claimed on Spring Coulee than can be met even with high water. (Anderson.) Mr. Anderson further testified that he cannot exercise his own Permit (for groundwater wells which were determined to effect surface water in Spring Coulee) during the irrigation season, because senior users call the stream.

Objector John Baker additionally claimed that Spring Coulee went completely dry in 1985, apparently as the result of the dam installation, since the creek had never gone dry before in Mr. Baker's more than 60 years of experience. He stated that the water in the creek was stagnant at the time of the hearing.

Objector Janet Danreuther, who is located approximately 53 miles downstream from the Applicant on the Teton River, testified that she believes water from Spring Coulee reaches the Teton River and supplements the water there. Mrs. Danreuther stated that it probably takes two weeks for water to reach the Danreuthers' diversion from the Applicant's point of diversion, but that every additional amount of water helps the water shortage which occurs on the Teton during irrigation season. Objector Bill Reichelt testified that he also believes that Spring Coulee contributes water to the Teton River, although he states that he has no knowledge as to how much water reaches the Teton River from Spring Coulee.

The Objectors in general objected to the Applicant's proposed appropriation on the basis that there is no way to determine how much water the Applicant is appropriating, nor to differentiate the different waters (purchased water, senior rights, "new" water) being appropriated when the Applicant calls the Objectors to obtain his senior rights. Raymond Anderson and Lyle Baker testified they have been called to release water as the result of the Applicant's appropriation.

9. The Applicant stated that water will flow below the dam, from springs, even if the dam is capturing all the flow from above. Objectors stated that the stream is dry below the dam when the dam captures the flow from upstream. (Glen Baker, John Baker.)

Based upon the Foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

Proposed Conclusions of Law

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

85-2-311, MCA. Criteria for issuance of permit. (1) Except as provided in subsections (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

- (i) at times when the water can be put to the use proposed by the applicant,
- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed means of diversion and construction of the appropriation works are adequate to obtain and convey the Applicant's requested volume of water. However, no plan of operation was proposed which ensures that the water rights of a prior appropriator will not be adversely affected.

The record shows that the Applicant's present means of operation is not adequate to protect the water rights of prior appropriators. Testimony indicates that the Applicant's impoundment normally is operated to maintain a full reservoir. (Finding of Fact 6.) No water spills from the reservoir until the reservoir capacity has been reached. Therefore, whenever the Applicant is pumping from this point of diversion, the dam continuously captures the flow coming down Spring Coulee, unless the flow exceeds the Applicant's 1750 gpm pumping rate. The Applicant provided no evidence of the flows of Spring Coulee which might indicate that flows exceed diversions. The testimony of the Objectors indicates that the flow of Spring Coulee, at least at times during the irrigation season, does not make it past the dam. (Findings of Fact 8, 9.) This has resulted in loss of water to downstream appropriators, sometimes to the extent of the stream going completely dry at the Objectors' points of diversion.

Although the weather (or some other factor apart from the Applicant's damming of Spring Coulee) may be responsible, the Applicant did not provide substantial evidence that this was the case. Objector John Baker's testimony that there was always water prior to the installation of the dam, and his long experience with Spring Coulee is entitled to great weight. See, e.g., Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, September 30, 1981 Proposal for Decision (Final Order March 1, 1982). The

Applicant alleged that the stream normally does not run when the year is extremely dry, but he did not provide evidence (in the form of photographs or flow records, for example) to support this allegation. Since it is the applicant who has the burden of proof in applications for beneficial water use permits, it is up to the Applicant to provide substantial credible evidence that the water rights of a prior appropriator will not be (in this case, are not being) adversely affected by the Applicant's appropriation. The Applicant has failed to meet this burden of proof.

The Applicant did not specify any alternative to the present method of operating the diversion structure which would make it possible for him to divert and store water in his reservoir without interfering with other water uses. Even assuming that the Applicant would utilize the headgate in the structure to release water for downstream use, there is no practical plan on the record detailing how to sort out which water the Applicant would be using at any given time (see Findings of Fact 4, 7), so that it would be possible to determine when the Applicant had stored "extra" water and when he had consumed the stored water.

The Applicant's witness suggested that appropriation for the new use could be determined by establishing the base flow of Spring Coulee, determining how much of the flow was needed to meet the Applicant's senior rights, taking into account the other uses, determining when excess water was available to be stored, then working backward from the Applicant's pumping records to determine when the Applicant had diverted the full requested volume of water. (Finding of Fact 7.)

It is possible that some such accounting system could be established, although there are many difficulties which suggest themselves even on the face of the matter: to establish the base flow for Spring Coulee, for example, would take many years of flow data to establish, and would likely require the placement of measuring devices below the diversion structure and on the Farmers' Co-op water conveyance, a daily determination of the flows and volumes being diverted by the Applicant, and attendant record-keeping. The Applicant did not provide any specific evidence of how his appropriation works could be operated to administer such an elaborate system of measurement and release, nor did he provide evidence sufficient to allow the Department to make the Applicant's system feasible through conditioning of a permit. Although it indeed may be feasible to operate the diversion structure without adverse effect to other appropriators, the evidence to support a finding that the proposed operation of the appropriation works is adequate is not present on the record.

5. The Applicant has failed to provide substantial credible evidence that the water rights of prior appropriators will not be adversely effected.

As discussed above, the Applicant's present operation of the diversion works is not adequate to protect prior appropriators downstream from adverse effect, nor is there any specific alternative on the record which would provide such protection. In addition, the Applicant has failed to provide evidence that upstream appropriators are protected against calls which result

in the Applicant receiving water for his new use, as well as for the senior rights for which the call is being made, at times when the Applicant is only entitled to his most senior rights. (See Finding of Fact 8.)

6. Since the Applicant failed to meet his burden of proof providing substantial credible evidence that the statutory criteria are met, his application for a beneficial water use permit must be denied. Therefore, the Applicant is not entitled to capture, divert, or any way cause to be diverted any water in excess of his existing senior appropriation water rights. Any water which the Applicant's diversion structure stores, diverts, or delays above and beyond his senior appropriation rights constitutes an illegal diversion. See MCA §85-2-302 (1987).

Because the Proposal for Decision in this matter is rendered on the basis of a failure of proof, rather than because the parties developed a full record and the evidence weighed against the Applicant, the proposed order is made without prejudice so that the Applicant may reapply for a beneficial water use permit at such time as he is in possession of the necessary evidence.

THEREFORE, based upon the proposed Findings of Fact and Conclusions of Law and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 58133-s410
by Lloyd DeBruycker is denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20

days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 8th day of October, 1987.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 8, 1987, she deposited in the United States mail, first class postage prepaid, a PROPOSAL FOR DECISION by the Department on the Matter of the Application for Beneficial Water Use Permit No. 58133-s410, by Lloyd DeBruycker, addressed to each of the following persons or agencies:

Lloyd DeBruycker
Box 7700
Dutton, MT 59433

Harold and Fay V Baker
Route 2
Choteau, MT 59422

Charles and Janet Danreuther
Box 43
Loma, MT 59460

Charles M Joslyn
P O Box 843
Choteau, MT 59422

Gough, Shanahan, Johnson &
Waterman
P. O. Box 1715
Helena, MT 59624

Rhett Hurless
Consultant
P O Box 3474
Bozeman, MT 59772

Teton Water Users Assn
Box 222
Carter, MT 59420

Raymond Anderson
P O Box 844
Choteau, 59422

CASE # 58133

Bob Larson
Field Manager
P O Box 1828
Havre, MT 59501

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Susan Howard

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

On this 8th day of October, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Adams

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1990

CASE # 58133